SUPREME COURT, U. S.

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No. 671

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER SESSION, 1967.

THE BIBB COUNTY BOARD OF EDUCATION, ELLINGTON P. JONES, HENRY BOLDING, BRITT COX, C. E. HORNSBY, JR., and FRANCIS B. PRATT,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

JURISDICTIONAL STATEMENT

In Behalf of Appellants, The Bibb County Board of Education, Ellington P. Jones, Henry Bolding, Britt Cox, C. E. Hornsby, Jr., and Francis B. Pratt.

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1.

(a)

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE DECREES, ORDERS AND OPINIONS DELIVERED IN THE COURT BELOW.

Order dated May 18, 1967, signed by United States Circuit Judge Richard T. Rives, United States District Judge H. H. Grooms and United States District Judge Frank M. Johnson, Jr.

This is the order appealed from and made the subject of this particular appeal, a copy being appended hereto as Appendix 1. It is doubtful whether it was intended to be an opinion as such (it is certainly not a formal opinion), but since (h) of Rule 15 requires that the Court's findings and conclusions of law be appended, the portions of the findings and order of that date, applying to The Bibb County Board of Education and its members, are shown in Appendix 1.

This order and the appeal therefrom arise as an incident and sequel to the decree and judgment dated March 22, 1967, signed by the same three judges, and made the basis of the appeal in the case already docketed in this Court as No. 489, October Session, 1967, entitled as follows:

> Governor Lurleen Burns Wallace, in her capacity as Governor of the State of Alabama, and as President of Alabama State School Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer of Alabama State Board of Education; James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrell, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Ward and Harold C. Martin, as members of Alabama State Board of Education, Appellants, v. United States of America, Appellee.

For convenience we characterize this as the main case, the opinion in which is reported in 267 F. Supp. 458 (M. D. Alabama 1967). Three prior opinions in the main case are:

Anthony T. Lee et al., and United States of America, Plaintiff and Amicus Curiae v. Macon County Board of Education (1963), 221 F. Supp. 297;
United States v. Wallace (1963), 222 F. Supp. 485;
United States v. Rea (1964), 231 F. Supp. 772;

Lee and the United States of America, Plaintiff and Amicus Curiae v. Macon County Board of Education (1964), 231 F. Supp. 743.

[These citations, we conceive, are required by 1 (h) of Rule 15.]

A copy of the judgment and decree of March 22, 1967, is appended as Appendix 1 to the Jurisdictional Statement of the appellants in the main case, Governor Lurleen Burns Wallace et al., Appellants v. United States of America, Appellee, already on file in this Court, and a copy of the opinion therein is shown as Appendix 2 thereof. To avoid duplication and for the sake of brevity, the appellants, The Bibb County Board of Education et al., ask leave to adopt by reference the contents of that Jurisdictional Statement, with appendices, insofar as the contents are relevant to the issues involved herein.

(b)

A CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED:

(i) The nature of the proceeding and the statute pursuant to which it is brought.

The order of the Court below, appealed from, dated May 18, 1967, was by a three-judge court constituted pursuant to Sections 2281 and 2284, Title 28, United States Code, for the purpose of hearing this cause in United States District Court for the Middle District of Alabama, Eastern Division, composed of United States Circuit Judge Richard T. Rives and United States District Judges H. H. Grooms and Frank M. Johnson, Jr. This appeal is taken pursuant to 28 United States Code, Section 1253. Said

Court was constituted, in accordance with the provisions of the statutes of the United States, by order granted on the 6th day of February, 1964, a copy of which is attached as Appendix 21 (p. A256) to the Jurisdictional Statement in the main case.

Following the rendition of the final decree in the main case and the opinion of the three-judge court, filed March 22, 1967 (See Appendix I and Appendix II, Jurisdictional Statement, main case), which, among other things, directed the State Superintendent of Education to require ninety-nine school boards in Alabama (including the Bibb County Board) to file with the State Superintendent a uniform plan of desegregation prescribed in the decree of March 22, 1967, the Bibb County Board of Education, standing upon what it conceived to be its rights, failed to comply with the requirement, and hence on April 22, 1967, after the taking of the appeal in the main case (notice filed April 7, 1967—Appendix 4, main case, Jurisdictional Statement, p. A149), the United States, plaintiff-intervenor in the main case, filed a motion to add, ex parte, four school boards, including the Bibb County Board, as parties defendant, and also for an order requiring the Bibb County Board, among others, to show cause why an order should not be entered requiring said Board to adopt a desegregation plan meeting the standards embodied in the plan of the decree of March 22, 1967, main case (plan attached as Exhibit A to the decree). This motion is a part of the record, but is not attached as an appendix. The District Court made an order thereon, dated April 24, 1967 (Appendix X, Jurisdiction Statement, main case, p. A175) adding the Bibb County Board as a party, and ordering said Board, among others, to appear before the Court on the morning of May 13, 1967, "to show cause." • • • why said Board should not be ordered to adopt such desegregation plan. Prior to the entry of this order, the Bibb County Board of Education had not been a party

in any sense to the court proceedings. While the deposition of the Board's Superintendent, Mr. Pratt, had been taken, as shown by the record, this was taken in the main case long before the Board became a party and without any representation on the part of said Board in the taking of such deposition. The allowance of this deposition in evidence over the objection of the Board's attorney on May 13, 1967, at the hearing on the order to show cause, is assigned as error.

Thus, the only pleading filed against the Bibb County Board, the Government's motion on an order to show cause, utterly fails to allege any facts, or to make any charges against the Board, which would justify the order which was later rendered by the three-judge court, requiring the Bibb County Board mandatorily to adopt and file such plan of desegregation.

At the hearing on May 13, 1967, the Bibb County Board of Education and the individual appellants here (members of the Board and the Superintendent, all added as parties defendant along with the Bibb County Board) filed an objection to the motion of the United States (to show cause) containing ten separate grounds challenging the jurisdiction of the District Court to require the Board to submit a plan of desegregation, and also asserting improper venue. The concluding paragraph contains a prayer that the objection and each ground thereof be treated in the alternative as a motion to dismiss (the last ground of the objection is that the motion of the United States fails to state a claim against the said Board and the individual objectors upon which relief can be granted).

The objection is attached as Appendix 2 to this Jurisdictional Statement and appellants ask and pray that the separate and several grounds be treated as questions presented by this appeal under paragraph (c) (1) of Rule 15 of this Court.

This action leading up to the judgment of March 22, 1967, was initiated by supplemental complaints filed by the United States of America acting through the Attorney General as plaintiff-intervenor and amicus curiae in September and November, 1966, seeking (a) to have declared unconstitutional a tuition grant law passed by the legislature of the State of Alabama and approved by the governor on September 1, 1965, which appears as Title 52, No. 61 (8) of the Code of Alabama and (b) as described by the three-judge court (p. A31) "asking for a state-wide desegregation order and an injunction against the use of state funds to support a dual school system."

The proceeding (motion) by which the Bibb County Board and its individual members and officer were first brought into the case, culminating in the mandatory order of May 18, 1967, was not based specifically upon any statute, and the only statute or statutes that can be involved are those conferring jurisdiction upon the three-judge court, already mentioned.

(ii) **The date of the Judgment or Decree sought to be reviewed and the time of its entry, the date of any Order respecting a rehearing, the date the Notice of Appeal was filed, and the Court in which it was filed.**

The date of the judgment or decree sought to be reviewed is May 18, 1967, also the time of its entry. There is no order on rehearing, none having been requested. The notice of appeal was filed on June 17, 1967, in the United States District Court for the Middle District of Alabama, Eastern Division. This order has already been attached as Appendix 1 to this Jurisdictional Statement.

(iii) **The Statutory Provision believed to confer on this Court jurisdiction of the appeal.**

Section 1253, Title 28 of the United States Code, which authorizes appeals directed to this Court from injunctive

orders of a three-judge court is conceived to be the statute involved. Sections 2281 and 2284, Title 28, United States Code, prescribe the jurisdiction of three-judge courts.

(iv) **Cases believed to sustain the jurisdiction.**

The three-judge court was constituted as shown in **Lee, et al., v. Macon County Board of Education,** M. D. Alabama, 231 F. Supp. 743, July 13, 1964, and in the subsequent case of the same name, reported in 267 F. Supp. 458 (the report of the main case). The court was constituted in the first instance primarily because of the attack upon the constitutionality of the first tuition grant law of the State of Alabama, (Chapter 4B [§§ 61(13) through 61(21)] Title 52, Code of Alabama), and subsequently, upon supplemental complaint, the court was called upon to pass upon the Alabama 1965-1966 tuition grant law, § 61(8), Title 52, Code of Alabama. Evidently considering that the question whether the defendants in the main case, the governor, the Alabama State Board of Education, the members of said Board, and the State Superintendent of Education, all state officials, had exercised such authority over the actual operation of the various school systems throughout the state so as to maintain a segregated or dual system of schools (pp. A31, A62, A63, A64, et seq., the opinion in the main case as shown in the appendix to the Jurisdictional Statement [Case No. 489]), bore a close relationship to the question of the constitutionality vel non of the tuition grant laws, the three-judge court enjoined the defendants in the main case from "discriminating on the basis of race in the operation or the conduct of the public schools of Alabama or in any manner pertaining to the public schools of Alabama" (Decree, March 22, 1967, Appendix, p. A2, Jurisdictional Statement, main case), and ordered the State Superintendent of Education to notify ninety-nine school systems,

including the Bibb County Board of Education (each being under the supervision and management of city and county boards of education, each an independent corporate agency of the state—Title 52, Chs. 5 and 8, Alabama Code), that each was required to adopt a desegregation plan for all grades commencing with the 1967-68 school year meeting the standards embodied in the plan attached to the decree as Exhibit A. None of these boards had been subjected to any previous court order, and none had been made a party to the litigation. In regard to the contention made on the hearing in the main case by the defendants therein in effect that the court should not enter a decree directed against the local boards without at least making them a party to the litigation (the argument being that they were indispensable parties if they were to be subjected to the mandates of the decree), the court said (Appendix, A65, to the Jurisdictional Statement in Case No. 489, also reported in 267 F. Supp. 458, 482):

> "The argument that this Court is proceeding without jurisdiction over indispensable parties to this litigation, to-wit, local school boards throughout the state, is not persuasive. We are dealing here with state officials, and all we require at this time is that those officials affirmatively exercise their control and authority to implement a plan on a state-wide basis designed to insure a reasonable attainment of equal educational opportunities for all children in the state regardless of their race. It may be that in some instances a particular school district will need to be brought directly into the litigation to insure that the defendant state officials have implemented this Court's decree and that the state is not supporting, financially or otherwise, a local system that is being operated on an unconstitutional basis. Hopefully, these instances will be the exception and not the rule. Clearly this possibility does not diminish the propriety of

> the state-wide relief to be ordered. Having already resolved this issue of state-wide relief against the defendants in the order made and entered in **Lee, et al., United States of America, Amicus Curiae v. Macon County Board of Education**, July 13, 1964, 231 F. Supp. 743, further discussion and analysis is not necessary."

The Bibb County Board was later brought into the case, after final decree, as suggested in the above quoted excerpt from the opinion, and asserted and now asserts that the Court below committed error in that regard and in the decree that was later entered against the board, as below outlined, but cites and quotes all of the above as supporting the general jurisdiction of the court to act (although the court committed error in so acting, the appellants contend).

(v) The validity of a statute is not directly involved on this particular appeal.

(c)

THE QUESTIONS PRESENTED BY THIS APPEAL.

The grounds of the objection of the Bibb County Board to the motion of the United States to show cause, appended as Appendix 2 to this Jurisdictional Statement (also including a motion to dismiss) presents substantial questions involved on this appeal. That portion of the appellants' notice of appeal from the order of May 18, 1967, outlined in the questions presented on appeal, is appended hereto as Appendix 3. Appellants ask that these be treated as statement of questions presented on appeal as if incorporated in this section of the Jurisdictional Statement, as well as the grounds stated in the "objection", Appendix 2 (we eliminate the ground or

grounds of objection whereby it was contended in the District Court that the subject matter of the hearing below was not a proper matter for the jurisdiction of a three-judge court).

More succinctly stated, three of the principal questions presented may be stated as follows:

(1) Did the District Court for the Middle District have proper venue over the Bibb County Board, its members and superintendent, all of whom were residents of Bibb County within the area of the Northern District of Alabama as shown by the record within the meaning of Section 1391, Title 28, United States Code Annotated, the Bibb County Board and the individual appellants being not made parties prior to the final decree of March 22, 1967, and the proceeding against the Board and the individuals following that decree being necessarily an original and independent proceeding against these appellants?

(2) Were the Bibb County Board and the other appellants properly joined with the defendants in the main case as parties defendant, within the meaning of Rule 20 of the Federal Rules of Civil Procedure in view of the fact that (we assert) by the very nature of this supplementary proceeding the right to relief asserted against the Board and individual defendants was not in respect of or arising out of the same transaction or occurrence or series of transactions or occurrences, as the right asserted in the main case?

(3) Did the court err in ordering the Bibb County Board of Education, its members and superintendent, to adopt and file the uniform plan of desegregation, the plan submitted to be adopted by the other ninety-eight boards (the equivalent of a permanent mandatory injunction), merely on a motion following the decree in the main case (to which the Bibb County Board was not a party), on a mo-

tion which alleged nothing against the Board (and there was no other pleading which made a charge against the Board), by way of discrimination or otherwise, and which placed the burden upon the Board to acquit itself of that with which it had not been charged?

(4) Did the court err in rendering its decree against the Bibb County Board, and the other appellants, ordering the adoption and filing for the plan of desegregation merely upon the basis of the introduction by the United States of the deposition of the Superintendent of Schools of Bibb County over the objection of said appellants, such deposition having been taken prior to the time when said appellants became parties to any proceeding?

(5) Did the court err in holding that the motion of the United States, the only pleading directed against these apellants, stated a claim upon which relief could be granted against these appellants?

(d)

A CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

These have for the most part been stated as shown by the transcript of the proceedings. When the case was called for hearing, the Board and the individual defendants filed the objection to the granting of the motion, already noted and appended. All grounds of objection were overruled by the court, and the decree of mandatory injunction rendered on May 18, 1967, was based in essence upon the ground that the new defendants had not shown sufficient cause, and that the deposition of the superintendent (while admittedly taken and filed prior to the addition of the Board and the others as parties) was

sufficient as an "affidavit" in support of the motion for an order to show cause. The judgment of May 18, 1967, was actually a final judgment and it is inconceivable that the "affidavit" could have been treated as sufficient evidence against the Board (over the Board's objection) to justify the rendition of a mandatory injunction order. No facts were alleged in the only pleading involving the Board except only that the Board had failed to file the uniform plan. This constituted a denial of due process, an unwarranted procedure depriving the Board of its rights (and the individual defendants). The only proceeding against the Board was a motion and order to "show cause", a procedure unheard of in the annals of jurisprudence as such. There was no contempt citation (and if there had been, there was no proof), and no charge that the Board had acted in concert with any of the original defendants. The Board was an independent agency having full authority over the assignment of pupils and teachers within the system under its jurisdiction (See opinion of the justices [Sup. Ct. of Ala., 160 So. 2d 648]). Any evidence that the Board may have acted jointly with the defendants in the main case, or committed any act in respect of or arising out of the same transaction or occurrence as the act or acts of any of the state officials who were defendants in the main case, was necessarily adduced prior to the Board's having been made a party, and we do not believe that in any event there was any evidence of such in the record whatsoever.

Thus, the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument, for their resolution. We assert: The venue was wrong, the Board and the individual new defendants were improperly joined, the only pleading filed against the Board (and the other appellants) failed to state a claim upon which relief could be granted, and the

Board and appellants were called upon, without any sufficient evidence, to acquit themselves of some charge which had not even been made.

Respectfully submitted,

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